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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000043-MR

JEANIE RADER

APPELLANT

v. APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE JOHN W. MCNEILL, JUDGE
ACTION NO. 01-CR-00013

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jeanie Rader brings this appeal from a January 6, 2003, jury verdict in the Fleming Circuit Court convicting her on two counts of first-degree criminal abuse. We affirm.

On May 11, 2001, Jeanie was indicted by the Fleming County Grand Jury upon two counts of criminal abuse in the first degree. The indictment arose from injuries sustained by two infants (Madyson Leet and Brianna Jessie) for whom Jeanie regularly provided daycare at her home in Flemingsburg. On the

morning of April 17, 2001, both infants were left in the care of Jeanie. Later that evening, the children were picked up by their respective parents. At that time, it was readily apparent that both infants' physical condition had changed dramatically since that morning.

Madysen screamed loudly when picked up and was vomiting. Her skin was pale and had no color. Brianna was not very responsive and was also pale. Furthermore, Brianna would not spread her arms apart when picked up, but instead would "hunker up." Eventually, both children were taken to the emergency room of the Fleming County Hospital.

Madysen was diagnosed with a left parietal occipital skull fracture and had to be transported to a specialized pediatric center in Lexington, Kentucky. Brianna was diagnosed as suffering from proximal oblique humerus fracture of the left arm.

Child protective services and the police investigated the matter. When pressed for an explanation of the infants' injuries, Jeanie stated that she had dropped Madysen twice and that Brianna had fallen while trying to pull herself up in a chair.

Before trial, Jeanie filed a "Motion to Sever Counts." Therein, she sought to sever each count of criminal abuse and, thus, conduct separate trials upon each count. The circuit

court denied Jeanie's motion, and both counts went to a jury trial. The jury ultimately returned a verdict of guilty upon both counts of criminal abuse in the first degree. On January 6, 2003, the circuit court sentenced Jeanie to ten years upon each count to run concurrently for a total sentence of ten years' imprisonment. This appeal follows.

The sole issue raised on appeal by Jeanie is whether the circuit court abused its discretion by denying her motion to sever the two criminal abuse counts. Specifically, Jeanie contends that joinder of both counts of criminal abuse in the first degree resulted in prejudicial error. To prove prejudicial error, appellant argues that evidence of one count of the indictment would have been inadmissible in a separate trial upon the other count.

In Jackson v. Commonwealth, Ky., 20 S.W.3d 906, 908 (2000), the Supreme Court of Kentucky held that "[a] trial court has broad discretion with respect to joinder and a decision in that regard will not be reversed absent a showing of prejudice and clear abuse of discretion." In determining whether joinder was proper, an important factor is "whether evidence of one of the offenses would be admissible in a separate trial for the other offense." Violett v. Commonwealth, Ky., 907 S.W.2d 773, 775 (1995). In this case, we believe that evidence of either Brianna's injuries or Madyson's injuries would have been

admissible in separate trials of the other under Kentucky Rules of Evidence (KRE) 404(b).

Under KRE 404(b), evidence of other crimes or wrongs may be admissible “[i]f offered for some other purpose, such as proof of . . . intent . . . or absence of . . . accident” The evidence of Madyson and of Brianna’s injuries is relevant to prove intent and absence of mistake on the part of Jeanie. Moreover, we observe that as in Violett, “[t]he pattern of behavior and conduct was strikingly similar and it was sufficiently close in time.” Violett, 907 S.W.2d at 775. Accordingly, we conclude that evidence Madyson and Brianna’s injuries were also relevant to prove pattern of conduct. See Lear v. Commonwealth, Ky., 884 S.W.2d 657 (1994). On the whole, we cannot say that the circuit court abused its discretion by denying Jeanie’s motion to sever the two counts for trial.

For the foregoing reasons, the judgment of the Fleming Circuit Court is affirmed.

ALL CONCUR.

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